In The

Supreme Court of the United States

October Term, 1977

No. 77-1050

ANNA DeKAM, JOAN DeKAM, BORIS KARPENKO, TETIANA KARPENKO, VICTOR BRADLEY, MARGARET BRADLEY, ROBERT PETROVICH, BORICA PETROVICH, CARL GILGALLEN, PAT GILGALLEN, HERBERT FRIEBE, TUTH FRIEBE, DONALD LAHTI, HANNAH LAHTI, WILLIAM WINER, ROSE WINER, THADDIUS KONECKI, WANDA KONECKI, RONALD HULEWICZ, SUSAN HULEWICZ, ROBERT CORRIGAN, ANN CORRIGAN, RICHARD BONDIE, ELIZABETH RATKUS, CHARLETTE MARTINUZZI, GUIDO MARTINUZZI, DEL SCODELLARO, ROSE SCODELLARO, MARIAN VALDES, GEORGE BEAUDIAN, EDNA BEAUDIAN, ESAM SARAFA, JOSEPHINE SARAFA, GEORGE MALESKY, DORIS MALESKY, STANLEY SHAPIRO, EDMUND KURKOROWSKI, IRENE KURKOROWSKI, JACK CROCKER, GLORIA CROCKER, RONALD BARRY, NORMA BARRY, PHILLIP CANDELLA, RITA CANDALL, NICK MADIAS, MARIAN MADIAS, ORTON HAMILTON, LOIS HAMILTON, DAVID SILVERMAN, PAT SILVERMAN,

Appellants,

v.

LAWRENCE INSTITUTE OF TECHNOLOGY, a Michigan non-profit corporation, CITY OF SOUTHFIELD, a municipal corperation, and ETKIN, JOHNSON & KORB, INC., a Michigan corporation,

Appellees.

ON APPEAL FROM THE
COURT OF APPEALS
OF THE STATE OF MICHIGAN

MOTION TO DISMISS

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Appellees Lawrence Institute of Technology, Etkin, Johnson & Korb, Inc., and City of Southfield, pursuant to Rule 16 of the Rules of this Court, move the Court to dismiss this appeal from the judgment of the Michigan Court of Appeals on the ground that it does not present a substantial federal question.

QUESTION PRESENTED

Do the notice provisions of the Michigan Zoning Enabling Act, Mich. Comp. Laws Ann. 125.581 *et seq.*, Mich. Stat. Ann. 5.2931 *et seq.*, requiring that a municipality furnish notice of hearings scheduled to consider adoption of amendments to an existing zoning ordinance only by means of publication in a local newspaper of general circulation in such municipality, satisfy the standards of due process of law required by the Fourteenth Amendment to the United States Constitution?

STATEMENT

This appeal arises from an action brought by a group of residents of Southfield, Michigan against appellees Lawrence Institute of Technology ("Lawrence Institute"), Etkin, Johnson & Korb, Inc., ("Etkin"), and the City of Southfield to enjoin construction and use of a multi-million dollar, nine-story, student housing facility (the "Project") on certain property of Lawrence Institute. Appellants are owners of residential property located in the vicinity of the 14-acre site (the "Site") on which the Project has been built, opposite the existing campus of Lawrence Institute in Southfield, Michigan.

Lawrence Institute acquired the Site in three separate transactions during the period from 1965 to 1968. At the time of such purchases, these parcels of real estate were subject to deed restrictions which expired by their own terms in 1970 and to existing city zoning ordinances that limited the use of the property to single-family residential and other similar uses. In March 1968, Lawrence Institute petitioned the City of Southfield to approve a change in the zoning classifications of all three of these parcels of real estate to that of "ERO" (Educational Research and Office Building), in order to permit use of the property for student housing purposes.

Notice of the proposed zoning change was disseminated in a newspaper of general circulation within the city of Southfield, Michigan, at least fifteen days prior to the June 10, 1968, hearing on Lawrence Institute's zoning petition, and public utilities with easements across the Site were notified by certified mail, all as prescribed by the Michigan Zoning Enabling Act. Additional notices, not required by the Michigan Zoning Enabling Act, were mailed to certain landowners whose property was contiguous to the Site, according to the Southfield City Clerk's files and the minutes of the June 10, 1968, hearing on Lawrence Institute's petition. At the June 10, 1968, public hearing, no citizen expressed an interest in being heard, and after due deliberation, the Southfield City Council, acting pursuant to the Michigan Zoning Enabling Act, approved Lawrence Institute's petition for zoning reclassification.

Lawrence Institute requested a parking determination for the Project from the Southfield Zoning Board of Appeals in December 1975. On January 20, 1976, this Zoning Board of Appeals conducted an open public hearing on Lawrence Institute's request. Several homeowners who lived near the then-proposed student housing project attended the hearing and expressed their views in opposition to the construction of the Project. Following this, the City granted Lawrence Institute's request and imposed several requirements on the nature of the construction designed to minimize the aesthetic impact of the Project on surrounding landowners. Appellee Etkin placed a trailer on the Site on April 30, 1976, and began survey work one week later. Demolition of a house on the Site, as well as excavation work, followed within a few days thereafter.

The complaint in this action was filed in the Michigan Circuit Court for Oakland County on June 28, 1976. Appellants sought injunctive relief and monetary recovery for alleged damage to their property due to the construction of the Project, which by that time had commenced and progressed materially. The sole basis for relief sought by appellants in the trial court was that the requirement of giving notice by newspaper publication set forth in the Michigan Zoning Enabling Act violated the due process clauses of the state and federal constitutions because it failed to provide adequate notice of the zoning change.

The parties appeared on June 30, 1976, at a hearing in response to an Order to Show Cause issued by the trial court. Following this hearing, the court denied preliminary injunctive relief. An expedited trial on the merits was held on July 1, 1976; at its conclusion, the trial court issued an oral decision and opinion dismissing appellants' claim with prejudice. On July 7, 1976, a final judgment denying the appellants' request for preliminary and permanent injunctive relief and dismissing the complaint was entered.

On April 19, 1977, the Michigan Court of Appeals affirmed the judgment of the trial court. The appellate court held that the notice provisions of the Michigan Zoning Enabling Act satisfied the standards of due process and equal protection imposed by the federal and state constitutions. The Court found that notice

by publication was reasonably calculated and sufficient to inform interested parties of the pendency of zoning actions, noting that appellants did not have property interests significant enough to warrant judicial imposition of a stricter notice requirement.

Appellants applied for leave to appeal to the Michigan Supreme Court from the decision of the appellate court, but the Michigan Supreme Court denied the application for leave to appeal by order entered October 25, 1977.

ARGUMENT

The Michigan Court of Appeals correctly held that appellants have not been deprived of property without due process of law when they were notified by publication, but not by mailed written notice, of proceedings to amend the zoning classification of lands adjacent to or in the vicinity of their land.

Consistent with the decisions of this Court, the Michigan Court of Appeals recognized that due process of law is a flexible concept under which the specific obligations and duties of the state are not immutably fixed. *See Morrissey* v. *Brewer*, 408 U.S. 471 (1972); *Boddie* v. *Connecticut*, 401 U.S. 371 (1971); *Cafeteria Workers* v. *McElroy*, 367 U.S. 886 (1961); *Hannah* v. *Larche*, 363 U.S. 420 (1960). Thus, the Appellate Court correctly proceeded to balance appellants' interests against competing state considerations of economy and practicality in determining what process is due. *See Cafeteria Workers* v. *McElroy*, *supra; Hannah* v. *Larche*, *supra*. The appellate court carefully weighed the parties' interests in light of the constitutional requirement that appellants be accorded notice reasonably calculated under all the circumstances to appraise them of the pendency of the action and afford them an opportunity to present their objections. *See Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1949).

The property interests which are protected by the Fourteenth Amendment are not created by the Constitution but by state law. *Board of Regents* v. *Roth*, 408 U.S. 564 (1972); *Demorest* v. *City Bank Farmers Trust Co.*, 321 U.S. 36 (1944). If Appellants have no property interest under state law, they

present no question under the Due Process Clause of the Fourteenth Amendment.

The Michigan Court of Appeals determined that under Michigan law, appellants have, at most, minimal property interests at stake in this case. Under Michigan law, nearby property owners have no vested interest in the zoning classification of adjacent property. *Lamb* v. *City of Monroe*, 358 Mich. 136 (1959); *Baker* v. *Algonac*, 39 Mich. App. 526 (1972). Appellants' interests, as landowners abutting or adjoining the Site, are not comparable to the interests of an individual land contract purchaser in a proceeding by a state authority to foreclose a tax lien. *E.g.*, *Dow* v. *State of Michigan*, 396 Mich. 192 (1976).

The Michigan Court of Appeals rejected, as a matter of state law, appellants' claim, raised anew in this appeal, that a negative reciprocal easement arising from deed restrictions common to their land and the land of Lawrence Institute was a property right which was taken by the 1968 zoning change. The appellate court held that the restrictions continued to be enforceable despite a less restrictive zoning classification until they expired by their own terms. *See Brideau* v. *Grissom*, 369 Mich. 661 (1963); *Phillips* v. *Lawler*, 259 Mich. 567 (1932). Accordingly, the appellate court correctly declared the existence of the alleged negative reciprocal easement irrelevant to the constitutional question posed by appellants.

Implicit in the Michigan rule that nearby property owners such as appellants have no vested interests in neighboring zoning classifications is a recognition of the limited nature of the zoning process itself. It has been long held in Michigan that zoning enactments constitute legislative action. *Brandau* v. *City of Grosse Pointe Park*, 383 Mich. 471 (1970); *Roll* v. *City of Troy*, 370 Mich. 94 (1963); *Uday* v. *City of Dearborn*, 356 Mich. 542 (1959). It is similarly well-established that the notice requirements imposed by the Due Process Clause of the Fourteenth Amendment are not as stringent for governmental action that is legislative in character as they are for action that is adjudicatory in scope. *Hannah* v. *Larche*, *supra*. The more analogous a proceeding is to the legislative process, the less stringent is the notice requirement imposed by the Due Process

Clause. Personal notice is traditionally limited exclusively to the judicial forum. *Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239, U.S. 441 (1915). Indeed, in the *Mullane* case, most strongly relied upon by appellants, this Court said:

> "[A]t a minimum [the words of the Due Process Clause] require that deprivation of life, liberty or property *by adjudication* be preceded by notice and opportunity for hearing appropriate to the nature of the case." 339 U.S. at 313 (emphasis added).

In recognition of this distinction between adjudicative and legislative governmental functions, it is clear that statutes involving legislative action need not provide for personal notice to affected citizens. State zoning statutes need not require that a municipal body give actual notice to the property owners within its boundaries whenever it acts to amend or revise its zoning classification structure, since all of the municipality's citizens have an interest in the community's zoning plan, and thus, its development. In light of these principles, it is hardly surprising that courts in states other than Michigan uniformly have rejected constitutional challenges of the sort made here to notice provisions contained in similar zoning legislation. *See e.g., Rutland Environmental Protection Ass'n* v. *Kane County*, 31 Ill. App. 3d 82, 334 N.E. 215 (1975), *cert. denied*, 425 U.S. 913 (1976); *Waite* v. *F. P. Plaza, Inc.*, 230 Ga. 161, 196 S.E. 2d 141, *cert. denied*, 414 U.S. 825 (1973); *Lawton* v. *City of Austin*, 404 S.W.2d 648 (Tex. Civ. App. 1966).

The Michigan Court of Appeals also properly assessed the burden which would be imposed upon local governments if personal notice of proposed zoning amendments were required, recognizing that, when appellants' minimal "property" interests are weighed against considerations of economy and practicality, notice by publication is plainly sufficient. To require a municipality to give potentially affected citizens personal notice of hearings on proposed zoning changes which do not directly involve their property is to saddle the municipality with an unreasonable burden. Should all citizens receive personal notice? Or, on the other hand, should the municipality determine

which property owners have aesthetic or other interests which appear to be substantial? As this Court has held, the Due Process Clause is not to be construed to place impossible or impractical requirements of notice upon state authorities. *Mullane* v. *Central Hanover Bank & Trust Co., supra.*

CONCLUSION

Appellants' minimal "property" interests, the legislative nature of the zoning forum, and the burden of disseminating personal notice to all persons who may be affected by zoning changes all confirm the correctness of the holding in this action by the Michigan Court of Appeals: the Michigan Zoning Enabling Act satisfies the due process requirements of the Fourteenth Amendment in requiring notice by publication of proposed zoning amendments. Because the Michigan Court of Appeals carefully weighed the interests of the parties in a manner consistent with the decision of this Court in *Mullane* v. *Central Hanover Bank & Trust Co., supra,* appellants' appeal raises no substantial federal question. Therefore, appellees respectfully move the Court to dismiss appellants' appeal from the judgment entered by the Michigan Court of Appeals.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

Joseph C. Basta, being first duly sworn, deposes and says that on the 20th day of February, 1978, three copies of Appelles' Motion to Dismiss were served on counsel of record for Appellants in the above-entitled action, by enclosing said copies in sealed envelopes and by depositing said envelopes in the United States mail with first-class postage prepaid, addressed as follows:

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Subscribed and sworn to before me this 20th day of February, 1978..

DELENA McKINNEY

Delena McKinney
Notary Public
Wayne County, Michigan
My Commission Expires: June 18, 1980